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Lubi Ak Tamat v Sitora bin Sepian (Juni Ak Ali, third party)

HIGH COURT (KUCHING) — CIVIL APPEAL NO 12–30 OF 2004-111(11)
LAU BEE LAN J
21 JULY 2005

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Civil Procedure — Documents — Agreed bundle — As to authenticity and contents — Document evidencing that appellant had undergone a hip replacement operation — Effect of inclusion of documents in agreed bundle

C

Evidence — Documentary evidence — Agreed bundle — Discharge summary exhibit — As to authenticity and contents — Whether trial judge misdirected herself in disallowing a claim for damages for hip injuries when no medical report adduced

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The essence of the appellant/plaintiffs ('the appellant') grievance under ground 1 of the memorandum of appeal was the failure or omission of the learned sessions court judge to award the appellant for loss of income after making a finding of fact that the appellant should be awarded a sum of RM16,000 for the appellant's pain and suffering resulting from the concussion and serious bleeding on forehead, nose, mouth and ear, laceration and injuries on knees. The appellant was admitted to the Serian Hospital for only one night. What was significant was that after the appellant's discharge from the said hospital, she still experienced pain in her hip area and the pain did not subside despite the painkillers consumed by her. The primary contention of the appellant in respect of grounds 2, 3 and 4 of the memorandum of appeal was the failure of the learned sessions court judge to consider the discharge summary (exh PI) which was an agreed document as to both authenticity and contents. He further submitted that the learned sessions court judge was inconsistent in her finding of fact and argued that having found that a reasonable award ought to be given for the pain and suffering caused by concussion and bleeding, laceration etc, she should, based on the same set of facts, award pain and suffering for the hip injury sustained by the appellant, being a 52 years old woman. The respondent submitted that the learned sessions court judge did not misdirect herself and had correctly disallowed the claim for damages for the hip injuries because the appellant 'had not adduced any medical report or call medical doctor to support her claim that there is a nexus between the hip problem and the accident, in other words, that the accident was the cause of the injury'.

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Held, allowing part of the appeal:

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(1) Exhibit PI, the discharge summary was not merely a document evidencing that the appellant had undergone a hip replacement operation without discussing the actual cause of the hip injury, as pointed out by the learned sessions court judge, but exh PI was an agreed document, agreed as to authencity, and contents. The word alleged in the statement 'Alleged fall from bus January 1998' could not be taken in isolation. It had to be viewed in its whole set of

circumstances from the time of appellant's first discharge from Serian Hospital till her operation for a total hip replacement on 17 November 1998 (see para 13).

(2) As it had been shown that it was the hip injury rather than the injuries mentioned in ground 1 that incapacitated the appellant from working as she used to do prior to the accident, the claim for loss of earnings resulting from injuries referred to under ground 1 ought to be rejected (see para 17).

[Bahasa Malaysia summary

Inti pati kilanan perayu/plaintif-plaintif ('perayu') di bawah alasan 1 memorandum rayuan adalah kegagalan atau peninggalan hakim mahkamah sesyen yang bijaksana mengawardkan perayu untuk kehilangan pendapatan selepas membuat penemuan fakta bahawa perayu sepatutnya diawardkan sejumlah RM16,000 untuk kesakitan dan kesengsaraan akibat daripada luka serius pada dahi, hidung, mulut dan telinga, luka melecet dan kecederaan pada lutut. Perayu dimasukkan ke Hospital Serian hanya untuk satu malam. Apa yang penting adalah selepas perayu dibenarkan pulang daripada hospital tersebut, beliau masih mengalami kesakitan pada bahagian pehanya dan kesakitan tersebut tidak berkurangan meskipun dengan pengambilan ubat tahan sakit. Hujah utama perayu berhubung alasan-alasan 2,3, dan 4 memorandum rayuan adalah kegagalan hakim mahkamah sesyen yang bijaksana menimbangkan 'discharge summary' (eksh PI) iaitu dokumen yang dipersetujui tentang kedua-dua keaslian dan kandungan. Beliau seterusnya berhujah bahawa hakim mahkamah sesyen yang bijaksana tidak konsisten dalam penemuan fakta beliau dan berhujah bahawa setelah mendapati bahawa satu award munasabah patut diberikan kerana kesakitan dan kesengsaraan disebabkan oleh luka, melecet dll, beliau sepatutnya, berdasarkan set sama fakta tersebut, memberi award untuk kesakitan dan kesengsaraan untuk kecederaan peha yang dialami oleh perayu, seorang wanita berumur 52 tahun. Responden berhujah bahawa hakim mahkamah sesyen yang bijaksana tidak salah arah dan dengan betul tidak membenarkan tuntutan untuk ganti rugi bagi kecederaan peha kerana perayu 'had not adduced any medical report or call medical doctor to support her claim that there is a nexus between the hip problem and the accident, in other words, that the accident was the cause of the injury'.]

Diputuskan, membenarkan sebahagian daripada rayuan tersebut:

(1) Ekshibit PI, 'discharge summary' tersebut bukan sahaja dokumen keterangan bahawa perayu telah menjalani pembedahan pertukaran peha tanpa membincangkan sebab sebenar kecederaan peha itu, seperti yang ditekankan oleh hakim mahkamah sesyen yang bijaksana, tetapi ekshibit PI adalah dokumen yang dipersetujui, dipersetujui berhubung keasliannya, dan kendungan. Perkataan yang dinyatakan dalam penyataan 'Alleged fall from bus January 1998' tidak boleh diambil maksudnya dengan sendirinya. Ia hendaklah dilihat sebagai satu set keseluruhan keadaan dari masa perayu mula dibenarkan keluar daripada Hospital Serian sehingga pembedahan beliau untuk pertukaran peha pada 17 November 1998 (lihat perenggan 13).

(2) Oleh kerana telah dibuktikan bahawa ia adalah kecederaan peha dan bukan

A kecederaan-kecederaan seperti yang dinyatakan dalam alasan 1 yang telah menyebabkan beliau tidak berupaya untuk bekerja seperti biasa sebelum kemalangan itu, tuntutan untuk kehilangan pencarian akibat kecederaan-kecederaan yang dirujuk di bawah alasan 1 patut ditolak (lihat perenggan 17).]

B **Notes**

For cases on documentary evidence of agreed bundle, see 7(1) *Mallal's Digest* (4th Ed, 2003Reissue) paras 1057–1066.

For cases on documents of agreed bundle, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 2277–2284.

C **Cases referred to**

Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor [1997] 3 MLJ 693 (refd)

Lim Ah Chi v Tan Ah Mui & Anor [1969] 1 MLJ 215 (refd)

D *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395 (refd)

Appeal from: Summons No 53–153–99–1 (Sessions Court, Kuching)

Raymond KF Kueh (Raymond KF Kueh Advocates) for the appellant/plaintiff.

E *Kilat Beriak (Chew Jugah Wan Ullok & Co) for the respondents/defendants.*

Desmond Sahathevan (Batten & Talma Advocates) for the first and second third party.

Lau Bee Lan J:

F **[1]** The court has considered the outline written-cum oral submissions of the learned counsel for the appellant/plaintiff and the first and second respondents/firstt and second defendants, Mr Raymond Kueh and Mr Kilat Beriak respectively. The court's findings and evaluation include:

G GROUND 1 OF THE MEMORANDUM OF APPEAL

[2] The essence of the appellant/plaintiffs ('the appellant') grievance under ground 1 is the failure or omission of the learned sessions court judge to award the plaintiff for loss of income after making a finding of fact that plaintiff should be awarded a

H sum of RM16,000 for plaintiffs pain and suffering resulting from the concussion and serious bleeding on forehead, nose, mouth and ear, laceration and injuries on knees. Here, the learned counsel has urged the court to use its own understanding of conditions to arrive at a reasonable figure for the loss of income which was the approach adopted by the Federal Court in the Singapore case of Lim Ah Chi v Tan Ah Mui & Anor [1969] 1 MLJ 215.

I **[3]** Mr Kilat submitted that no award should be made and the learned sessions court judge was correct in her finding because the appellant was only hospitalised for one night which showed that she could not have incurred loss of earnings due to the said injuries.

[4] I agree with Mr Kilat's point that PW1 (appellant) admitted that she was admitted to the Serian Hospital for only one night and this was confirmed by PW2, Dik a/k Inyang, appellant's daughter, who looked after her mother at the Serian Hospital for one night.

[5] What is significant is that after the appellant's discharge from the said hospital, she still experienced pain in her hip area and the pain did not subside despite the painkillers consumed by her. This was noted by the learned sessions court judge in her grounds of judgment in lines 2—8, p 120 of the record of appeal:

> After her discharge from Serian General Hospital, she went to see the doctors in the General Hospital in both Serian and Saratok a few times. She also went to two private clinic in Saratok about the pain on her hip. She was given pain killers but the pain got from bad to worse which she could not bear any more, so in November 1998 her daughter, PW2 brought her to see Dr Cyril Songan in 7th Mile who then referred her to the Sarawak General Hospital ('the SGH') on seeing that her condition was getting worse. (Emphasis added.)

[6] This leads me to Grounds 2, 3 and 4 of the memorandum of appeal which is overlapping and is best dealt together.

[7] I will revert to Ground 1 hereafter.

GROUNDS 2,3, 4 OF THE MEMORANDUM OF APPEAL

[8] The primary contention of Mr Raymond Kueh in respect of Grounds 2, 3 and 4 is the failure of the learned sessions court judge to consider the discharge summary (exh PI) which was an agreed document as to both authenticity and contents, ie:

> the contents in exht PI or the discharge summary which states 'Alleged fall from bus Jan 9 8...' was agreed to be true and correct by the parties and not as stated by the learned sessions court judge as 'discharge summary (exht PI) merely evidenced that PW1 had undergone a hip replacement without discussing the actual cause of the hip injury... (Emphasis added.)

[9] He further submitted that the learned sessions court judge was inconsistent in her finding of fact and argued that having found that a reasonable award ought to be given for the pain and suffering caused by concussion and bleeding, laceration etc, she should, based on the same set of facts, award pain and suffering for the hip injury sustained by the appellant, being a 52 years old woman. This, he submitted was especially substantiated by exh PI, an agreed document which showed that the Appellant had undergone a hip replacement operation.[9] He further submitted that the learned sessions court judge was inconsistent in her finding of fact and argued that having found that a reasonable award ought to be given for the pain and suffering caused by concussion and bleeding, laceration etc, she should, based on the same set of facts, award pain and suffering for the hip injury sustained by the appellant, being a 52 years old woman. This, he submitted was especially substantiated by exh PI, an agreed document which showed that the Appellant had undergone a hip replacement operation.

[10] Mr Kilat submitted that the learned sessions court judge did not misdirect herself and had correctly disallowed the claim for damages for the hip injuries because the appellant 'had not adduced any medical report or call medical doctor to support her claim that there is a nexus between the hip problem and the accident, in other words, that the accident was the cause of the injury'.

[11] In approaching this matter, I have cautioned myself of the approach to be taken by an appellate court with respect to interference of a trial judge's finding of facts which has been highlighted to the court in the various authorities cited by Mr Kilat including, *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395.

[12] Perusing the relevant evidence pertaining to damages, I find that although the appellant only stayed one night in the Serian Hospital and was discharged, she suffered much pain thereafter in her hip area as noted by the learned sessions court judge in her grounds of judgment. It is indeed unfortunate that all the doctors that she visited prior to her visit to a specialist at the Sarawak General Hospital in November 1998 (before 17 November 1998 when the hip replacement operation was performed) did not inform her anything on her hip injury despite her complaint of pain and according to PW2, when the appellant was first discharged her condition was serious, she was in a wheelchair and was unable to walk and although upon first discharge, the doctor said the injury was external and there was no internal injury, her physical condition as per the evidence showed otherwise. That was why ultimately, the appellant had to undergo hip replacement operation. This is borne out in the evidence of PW2 at p 40 of the record of appeal lines 6–15:

(Q) Which doctor suggested hip replacement injury?

(A) The specialist from the specialist clinic in SGH.

(Q) Did the specialist in SGH inform you of your mother's hip injury?

(A) Yes, they did, they x-rayed my mother twice before the operation. They told me it was necessary for my mother to go for the hip operation.

(Q) Did they tell you why?

(A) He said that if my mother was not operated, the wound in the hip would get worse and she might be paralyzed.

(Q) Did they suggest any other method beside operation?

(A) No.

[13] Exhibit PI, the discharge summary is not merely a document evidencing that the appellant had undergone a hip replacement operation without discussing the actual cause of the hip injury, with respect, as pointed out by the learned sessions court judge, but exh. PI is an agreed document, agreed as to authencity, and contents. The word alleged in the statement 'Alleged fall from bus Jan 1998' cannot be taken in isolation. It has to be viewed in its whole set of circumstances from the time of appellant's first discharge from Serian Hospital till her operation for a total hip replacement on 17 November 1998.

In *Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693, Poh Swee Chin FCJ (as he then was) (delivery judgment on behalf of the Supreme Court) whilst touching on the point of interpretation of agreed bundles of documents at p 706D stated:

> It is important enough for me to repeat that if there are express conditions or terms in regard to the inclusion of any document to the agreed bundle, then the document would have to be dealt with according to and subject to such express conditions. (Emphasis added.)

[14] In this instant case, as rightly pointed out by Mr Raymond Kueh, exh PI was a document in agreed bundle 'B' which is the bundle of document, agreed as to authencity and contents. In my view, it would be sheer injustice to ignore the truth of the contents therein when there is evidence to show that the appellant was a passenger in the said bus which was involved in the said accident on 18 January 1998 and which started the whole chain of events which ultimately resulted in her undergoing a total hip replacement.

[15] I agree with Mr Kilat that the medical report dated 9 December 1998 at p 155 of the record of appeal has not been marked as an exhibit, being only in agreed bundle of documents 'C' which is agreed only as to authencity.

[16] I observe that the learned sessions court judge had made some reference to it when she alluded to the statement 'coupled this with an antalgic gait and avascular necrosis secondary to oesteoarthritis' but assuming if such reference was unlawful, it does not detract from the fact that even if it was not considered there is ample evidence that the appellant's movement was restricted after her first discharge from Serian Hospital.

[17] Reverting to ground 1, as it has been shown that it was the hip injury rather than the injuries mentioned in ground 1 that incapacitated the Appellant from working as she used to do prior to the accident, the claim for loss of earnings resulting from injuries referred to under ground 1 ought to be rejected.

[18] For the aforesaid reasons, I am constrained to reverse such part of the learned sessions court judge's decision and allow the appellant's appeal with costs to be taxed unless otherwise agreed for the amount which the learned sessions court judge stated should be granted if she is found to have erred with regard to her finding on the hip injury as follows:

(1) general damages for hip injury — RM30,000;

(2) special damages (medical fees and expenses) — RM4,667;

(3) loss of earnings — RM21,600 and

(4) Interest as awarded by the learned sessions court judge be maintained.

Part of appeal allowed.

Reported by Sally Kee